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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 117

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., ET AL.,
Petitioners

v.

RURAL ELECTRIFICATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 236 F. Supp. 271. The opinion of the court of appeals (Pet. App. B. pp. 34-47) is reported at 354 F.2d 859.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1966. A timely petition for rehearing was denied on February 7, 1966. The petition for a writ of certiorari was filed on May 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners have standing to attack a proposed loan by the Rural Electrification Administration to finance the construction of generation and transmission facilities by a rural electric cooperative which will compete with petitioners.

STATUTES INVOLVED

1. Section 4 of the Rural Electrification Act, 49 Stat. 1365, as amended, 7 U.S.C. 904, provides:

> Loans by Administrator for electrical plants and transmission lines; preferences; consent of State authorities
>
> The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the

extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefore as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section, prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further,* That no loan for the construction, operation, or enlargement of any generating

plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed.

2. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a), provides:

Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

STATEMENT

Petitioners instituted this action in the United States District Court for the Western District of Louisiana to enjoin the consummation of a loan by the Rural Electrification Administration ("REA") to the Louisiana Electric Cooperative, Inc. ("LEC"), a cooperative organized pursuant to the Louisiana Electric Cooperative Law (La. R.S. 12:301, *et seq.*),

which proposes to generate and transmit electric power at wholesale to member cooperatives, which, in turn, will distribute the power to individual members (R. 3, 370). The district court granted a preliminary injunction (R. 419, 421), and the court of appeals reversed (Pet. App. 34-47).

1. REA is an agency within the Department of Agriculture charged by Congress under the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. 901, *et seq.*, with the responsibility of making loans to finance the construction and operation of generating plants and electric transmission and distribution systems which will furnish electric energy to rural areas not receiving central station power. The Administrator is given general discretion, within specified limits, to set the terms and conditions of the loans, but the consent of the State authority having jurisdiction over such facilities must be obtained before an REA loan may be made. 7 U.S.C. 904, pp. 2-4, *supra*.

Procedures applicable to the making of generation and transmission loans are prescribed in an REA policy statement (REA Bulletin 111-3) published in the Federal Register. 29 Fed. Reg. 2765-2766, Pet. App. 29-33. Under this policy statement, the Administrator must (1) make a survey and determine wherein existing or proposed power supply contracts are unreasonable; (2) advise present suppliers why their contracts are unreasonable; and (3) attempt to have the contracts modified to make them reasonable.

2. LEC filed its application for a 56.5 million dollar generation and transmission loan with REA on August 3, 1962 (R. 35). On September 12, 1964, the applica-

tion was provided by the Administrator (R. 370), who certified to the United States Congress, in accordance with REA Bulletin 111-3 (see also S. Rep. No. 497, 88th Cong., 1st Sess.), that a power survey had been made, that the loan was needed because existing and proposed contracts between the member cooperatives and the privately owned power companies had been found to be unreasonable, and that the private power companies had failed or refused to modify these contracts to make them reasonable (R. 34). The Administrator said that the power companies had encroached upon the cooperatives' service areas and had failed to provide territorial integrity for the member cooperatives in their service areas. The Administrator also certified to Congress that no State agency had jurisdiction over the activities of the federated cooperative (R. 43-44, 45).[1]

3. On September 30, 1964, petitioner Central Louisiana Electric Company ("CLECO"), a supplier of power at wholesale to six of LEC's member distribution cooperatives, filed the present action to enjoin REA from consummating the approved loan. CLECO alleged, *inter alia*, that the Administrator had failed to comply with the "central station service" requirement of Section 4 of the Rural Electrification Act, 7 U.S.C. 904 (p. 2, *supra*), and with provisions of REA Bulletin 111-3. It also alleged that the loan would permit the operation of generation and transmission facilities

[1] La. Rev. Stat. 12:326 provides: "Cooperatives transacting business in this state pursuant to this Part shall be exempt in all respects from the jurisdiction and control of the Public Service Commission of this state."

in violation of the State law requirement that such facilities be based upon a certificate of public convenience and necessity.[2] Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009 (p. 4, *supra*), was invoked (R. 4-5) as conferring upon CLECO the standing to sue. CLECO alleged that if the federated cooperative obtained the loan and constructed the generating and transmission facilities, CLECO would lose business since LEC's member cooperatives would need less of CLECO's electric power (R. 9).

REA moved to dismiss the complaint, *inter alia*, on the ground that petitioner lacked standing to maintain the action (R. 118). The district court denied the motion and issued the preliminary injunction sought by CLECO (R. 419, 421). It also granted the motion of petitioners Louisiana Power & Light Company and Gulf States Utilities Company for leave to intervene as plaintiffs (R. 421). On appeal from the preliminary injunction, the Court of Appeals for the Fifth Circuit reversed on the ground that "the plaintiffs are without the requisite standing" to challenge the Administrator's determination to make the loan in question.

ARGUMENT

The court below correctly held that petitioners lack standing to challenge REA's loan to the cooperative. See *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464. See also *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A.D.C.) certiorari denied, 350 U.S. 884. Neither the Administrative Procedure

[2] La. Rev. Stat. 45:123.

Act nor the Rural Electrification Act conferred standing on petitioners to prevent a loan to a potential competitor.

1. It is well settled that Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009 (p. 4, *supra*) does not confer standing to sue on parties who do not otherwise have a sufficient interest to entitle them to legal relief. See, *e.g., Kansas City Power & Light Co.* v. *McKay, supra; Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency,* 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914; *Duba* v. *Schuetzle,* 303 F. 2d 570 (C. A. 8); *Gart* v. *Cole,* 166 F. Supp. 129, 134 (S.D.N.Y.), affirmed, 263 F. 2d 244 (C.A. 2), certiorari denied, 359 U.S. 978. See also *Pennsylvania Railroad Co.* v. *Dillon,* 335 F. 2d 292 (C.A.D.C.), certiorari denied *sub nom. American Hawaiian Steamship Co.* v. *Dillon,* 379 U.S 945; Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev. 255, 287; Note, 104 U. Pa. L. Rev. 843, 861. To the extent that Section 10 authorizes suit by any person "suffering legal wrong" or "adversely affected or aggrieved" (p. 4, *supra*), it was intended to be declaratory of existing doctrines regarding standing. Hence petitioners were entitled to sue only if the applicable statute or traditional doctrines entitled them to maintain this action.

2. Nothing in the Rural Electrification Act can be read as reflecting a congressional intent to accord to private power companies the right to halt loans made under the Act. The legislative history clearly shows that Congress' dominant objective was to provide electric power to those in rural areas who were without it.

Congress demonstrated no interest in protecting existing power companies from competition. See, *e.g.*, 80 Cong. Rec. 2752; Hearings before House Committee on Interstate and Foreign Commerce on S. 3483, 74th Cong., 2d Sess., pp. 56-57. The Act neither provides for notice and hearing with respect to proposed loans nor does it contain any reference whatever to "person aggrieved,"[3] "any person who will be adversely affected,"[4] "any party in interest,"[5] or any of the other phrases found in statutes which have been construed as granting a statutory right to sue. Compare *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-477. For these reasons the Court of Appeals for the District of Columbia Circuit squarely held more than 10 years ago that the Rural Electrification Act does not confer standing upon power companies to challenge, as violative of the Act's standards, loans approved by the REA Administrator. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U.S. 884. Congress has not, since that decision, seen fit to amend the Act to provide for judicial review, at the behest of existing companies,

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[3] *E.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 24(a) of the Utility Holding Company Act, 15 U.S.C. 79x(a); Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[4] *E.g.*, Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[5] Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20); cf. Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(a) ("any person disclosing a substantial interest").

of the approval of a loan application by a potential competitor.[6]

Nor can the necessary standing be supplied by the procedures prescribed in REA Bulletin 111-3 (Pet. 8-10). The bulletin sets out procedures to be followed in administering the lending program authorized by the Act. Competing power companies have no right to enforce the terms of the Act itself; they obviously have no greater rights with respect to the bulletin.

3. Nor do traditional principles of standing accord petitioners a right to bring this action. This Court has repeatedly held that damage flowing from lawful competition, though assisted by assertedly unlawful federal action, is *damnum absque injuria*. *Alabama*

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[6] In 1962 Mr. Walter Bouldin of Alabama Power Company proposed before the House Committee on Agriculture that the Rural Electrification Act be amended to read:

> *Provided*, That loans for generating capacity shall not be made by the Administrator where there is an adequate supply of electric energy available from investor-owned, taxpaying sources at publicly regulated rates and conditions of service, nor shall such loans be made until after due public notice has been given by the Administrator and provision made for interested parties to be heard in connection therewith.

Hearings on Food and Agriculture Act of 1962 before House Committee on Agriculture, 87th Cong., 2d Sess., pp. 680-681. The House Committee did not take favorable action on this proposed amendment. In 1963, Mr. Bouldin's proposal was incorporated in two House bills, H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess. These bills in express terms provided for judicial review:

> Provided further than any determination by the Secretary of Agriculture under the Act with respect to generation and transmission loans shall be subject to review in the same manner as orders of the Secretary subject to the Act of December 29, 1950, as amended * * * [the Administrative Orders Review Act, 5 U.S.C. 1031 *et seq.*]

The House also failed to take favorable action on these bills.

Power Co. v. *Ickes, supra; Tennessee Power Co.* v. *Tennessee Valley Authority, supra.* See also *Kansas City Power & Light Co.* v. *McKay, supra.* Cf. *Pennsylvania Railroad Co.* v. *Dillon, supra; Pittsburgh Hotels Assoc.* v. *Urban Redevelopment Authority,* 309 F. 2d 186 (C.A. 3), certorari denied *sub nom. Hilton Hotels Corp.* v. *Urban Redevelopment Authority,* 372 U.S. 916; *Berry* v. *Housing and Home Finance Agency,* 340 F. 2d 939 (C.A. 2); *Taft Hotel Corp.* v. *Housing and Home Finance Agency,* 262 F. 2d 307 (C.A. 2), affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967.

Petitioners' allegation of a "conspiracy" between REA and the cooperative does not render this line of decisions inapplicable. Virtually identical allegations were made in both the *Tennessee Power Co.* and *Kansas City Power and Light Co.* cases, and they were deemed insufficient to confer standing. See Transcript of Record in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* No. 27, O.T. 1938, pp. 55-58; *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d at 929.

Similarly, petitioners' standing to seek an injunction against the loan is not enhanced by their claim (Pet. pp. 11-12) that the competition will be unlawful because the operation of the generation and transmission facilities will be in violation of State law. The record is barren of evidence that petitioners possess property rights under State law which would be invaded by the cooperative's proposed operations. Indeed, petitioner CLECO's president conceded that his

company does not possess a certificate of convenience and necessity to operate in Louisiana (R. 352).[7] Nor does the cooperative's power to operate facilities which it will construct under the loan constitute a license to conduct its operations in violation of State law. Issues of Louisiana law are presently being litigated in the proper forums—the Louisiana Public Service Commission and the courts of that State. If it is eventually determined in those proceedings that the operation of the facilities would violate Louisiana law, the State courts can, of course, fashion an appropriate remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
HARVEY L. ZUCKMAN,
Attorneys.

JULY 1966.

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[7] For this reason alone, petitioners' reliance upon *Frost* v. *Corporation Commission*, 278 U.S. 515, is misplaced. In that case, the plaintiff possessed a franchise which was directly infringed by the State governmental action claimed to be illegal.

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